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No. 95-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE
and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS

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February 16, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

62 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 2 U.S.C. § 441a(d) violate the First Amendment by infringing on a political party's rights of political expression and association?

2. Must 2 U.S.C. § 441a(d) be construed to apply only to communications that contain "express advocacy" to avoid unconstitutional vagueness?

3. Is a statutory interpretation by the Federal Election Commission entitled to deference when that interpretation (a) raises serious constitutional problems; (b) conflicts with the clear meaning of the statute; (c) originates in an Advisory Opinion; and (d) is not adequately justified?

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BRIEF FOR PETITIONERS

Petitioners Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer [1] respectfully request that the Court reverse the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The September 6, 1995, order of the court of appeals denying the Colorado Party's suggestion for rehearing *en banc* is unreported and is reproduced at 49-50 of the Joint Appendix ("J.A."). The June 23, 1995, panel opinion reversing the district court is reported at 59 F.3d 1015 and is reproduced at J.A. 32-48. The August 30, 1993, order and memorandum decision of the United States District Court for the District of Colorado dismiss-

[1] All parties to this case are identified in the caption. The Treasurer is a nominal party. For simplicity, Petitioners will be referred to collectively as "Colorado Party" or "Party."

ing the complaint of the Federal Election Commission ("FEC" or "Commission") is reported at 839 F. Supp. 1448 and is reproduced at J.A. 17-31.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute involved in this case is the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-455 (1994).[2] Section 441a(d) of the Act in relevant part states:

> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> . . .
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make an expenditure in connection with the general election campaign of a candidate for Federal office

[2] Section references within this brief are to Title 2 of the United States Code unless otherwise noted.

> in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

J.A. 222-23. Other statutory provisions involved in this case are set out in their entirety at J.A. 217-38.

STATEMENT OF THE CASE

The Colorado Party, like any political party, wants to publicize its support for or opposition to candidates for election to federal office. However, the pennies-per-voter expenditure limit imposed on the Colorado Party by § 441a(d) does not permit the Party to send out a single letter to each potential Colorado voter, or even to each Colorado Republican. To do so would exceed the limit and invite civil or criminal prosecution by the United States government. The reality of this risk is shown by the FEC's attempt in this case to penalize the Colorado Party for a radio advertisement—run four months before either party had selected its senatorial nominee and seven months before the general election—that addressed important issues raised by an incumbent Congressman but, as the FEC concedes, did not expressly advocate the election or defeat of any candidate.[3] Absent this threat,

[3] The trial court ruled there was no express advocacy, and the FEC stated to the court of appeals that the agency did not challenge that finding. *See* Opening Appeals Brief for the Federal Election Commission at 20 n.4.

the Colorado Party is ready, willing and able to support the election or defeat of candidates for federal office at a level above the pennies-per-voter limit.

The primary relief sought by the Colorado Party is a declaration that § 441a(d) violates the First Amendment. The constitutionality of that provision was expressly noted and reserved in *Buckley v. Valeo*, 424 U.S. 1 (1976). If that declaration is granted, the rest of this appeal is moot.

When the Colorado Party sponsored the radio advertisement for which it is being prosecuted here, the Party believed that it was in compliance with § 441a(d) because the advertisement did not include "express advocacy" and thus was not "in connection with" any election as this Court has construed that phrase. The FEC contends, however, that § 441a(d) actually extends to any "electioneering message," an ill-defined concept which takes into consideration the speaker's subjective intent. If § 441a(d) is not ruled unconstitutional, the Colorado Party seeks rejection of the FEC's vague and subjective standard.

A. The Colorado Party

The Colorado Party is an unincorporated political association funded primarily by individuals who support its promotion of the values and goals of the Republican Party and its platform. The Party has several interrelated missions: "to ensure that incumbent Congressmen from the state of Colorado are held accountable to their constituents; to freely engage in political speech and association . . . to promote the public good by advocating sound principles of, and high standards for, public governance; and to help elect Republican candidates for political office in the state of Colorado." J.A. 127. The Colorado Party has a vital political interest, apart from any particular election, in maintaining public understanding of the respective positions of the Republican and Democratic parties and in holding the Democratic Party accountable for the positions and actions of its leaders. J.A. 194-95.

Like any political party, the Colorado Party has long thought that an important part of its mission is identifying and discussing the positions elected officials from Colorado take in Washington on issues of national importance. J.A. 194-95.

B. FECA's Limitations on Party Activities

The Colorado Party conducts its affairs subject to FECA and applicable Colorado law. Accordingly, the Party may not accept annual contributions from individuals in excess of $5,000. § 441a(a)(1)(C). In addition, the Party may not accept contributions from corporations or unions, § 441b, and it does not receive funding from federal or state governments. The funds at the Party's disposal are thus among the most difficult to raise and most carefully expended in all of federal politics.

In terms of disclosure, all contributions received and all expenditures made by the Colorado Party in support of federal election activities are publicly disclosed, and transactions over $200 are itemized. § 434. Political activities in connection with Colorado state and local elections are subject to state law, which also imposes disclosure obligations. Col. Rev. Stat. Ann. §§ 1-45-108 & 1-45-110 (West 1990). The Colorado Party's federal contribution and expenditure disclosures are easily accessible to the public through the FEC's Public Disclosure Division and the Colorado Secretary of State. § 439; 11 C.F.R. §§ 105 & 108. These limitations, prohibitions and disclosures insulate the Colorado Party from any potentially corruptive influences.

In addition to these broad checks upon potential political corruption, § 441a(d) imposes strict monetary limits upon political party expenditures. Specifically, § 441a(d) prohibits a state party from spending more than $20,000 or two cents times the voting age population of the state,

whichever is greater, "in connection with" an election to the United States Senate.[4]

Prior to the 1986 election, the FEC determined that Colorado had a voting age population of 2,367,000. *See* FEC 12 *Record 4* at 1 (Apr. 1986). Therefore, the Colorado Party was forbidden from spending more than $103,248.54 "in connection with" the 1986 U.S. Senate race. *Id.* The political party spending limits in connection with U.S. Senate campaigns in 1986 ranged from as little as $43,620 in sparsely populated states to $851,680.50 in California. *Id.*[5]

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[4] This same formula applies to U.S. House elections in states with only one district. For other House districts, the limit imposed by § 441a(d) is $10,000.

Section 441a(d)'s two-cents-per-voting-age-population figure is adjusted each election cycle for inflation. § 441a(c). In 1986, the inflation-adjusted figure was approximately 4.4 cents. *See* FEC 12 *Record 4* at 1 (Apr. 1986). The 1994 figure was approximately 5.9 cents. *See* FEC 20 *Record 3* at 4 (Mar. 1994).

[5] Because of increases in the state's population and adjustments for inflation, the Colorado Party would have been permitted to spend up to $154,001 in 1994 had there been a Senate election in Colorado that year. The lowest limit in other states in 1994 was $58,600, while California parties were permitted to spend $1,325,415. Those figures will be adjusted again in 1996.

Although party spending limits are adjusted for inflation, the adjustments have not kept up with the extraordinary rise in the costs of political communication. For example, from 1988 to 1992 alone, the cost of a 30-second commercial during prime time in Atlanta increased by up to 33% with top slots costing up to $10,000. Lewis, "The 1992 Campaign: Campaign Finance; Clinton's Coalition Proves Effective at Raising Money," *New York Times*, Mar. 3, 1992, at A20. Broadcast costs in larger media markets increased at even a higher rate. *Id.* During the same time period, the average cost of bumper stickers rose from 11 cents to 30 cents each, a 173% increase. *Id.* By contrast, the Consumer Price Index rose 20% between 1988 and 1992. Comparing FEC 14 *Record 3* at 3 (Mar. 1988), with FEC 18 *Record 3* at 3 (Mar. 1992).

Many other groups dwarf political parties in the amount of money that they spend in connection with federal elections. For example, the AFL-CIO recently announced that it plans to spend

In 1986, as is the custom for many political parties, the Colorado Party chose to assign its $103,248.54 spending limit under § 441a(d) to the National Republican Senatorial Committee ("NRSC"). J.A. 96. State political parties may assign their expenditure limits to a national political committee. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) ("*DSCC*"). The Colorado Party assigned its limit out of a general belief that, because of the low amount of money it is permitted to spend and the high cost of communicating with the electorate, the most effective way to reach voters is to pool its money with the NRSC or the National Republican Congressional Committee, whichever is appropriate. J.A. 175. *See DSCC*, 454 U.S. at 42. ("Agency agreements may permit all party committees to benefit from fundraising, media expertise, and economies of scale. In turn, effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party.").

C. The Events of 1986

In the first half of 1986, Colorado Congressman Timothy E. Wirth[6] made several highly-publicized statements which blurred the distinction between the Democratic and Republican parties and, in the view of the Colorado Republican Party, misrepresented his public

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$35 million on the upcoming 1996 U.S. House elections. Rosenblatt, "Labor to Pour Money Into Political Races," *Los Angeles Times*, Jan. 25, 1996, at A8 (Washington ed.). Similarly, the National Rifle Association's Institute for Legislative Action has an annual budget of $35 million, used primarily for independent political communication on gun control issues. Rezendes, "Clinton, NRA Find Battle Offers Mutual Benefits," *Boston Globe*, Oct. 15, 1995, at 1.

[6] Mr. Wirth was first elected to the U.S. House of Representatives in 1974, representing Colorado's Second Congressional District. *Politics in America: Members of Congress in Washington and at Home (1984)* at 234-35 ("*Politics in America*"). Congressman Wirth retained his Colorado House seat until 1986, when he ran for and won election to the United States Senate. He served one term in the Senate, declining to run for reelection. J.A. 196-97.

record. The Colorado Republican Party's response to these statements precipitated this case.

1. *Congressman Wirth's Public Advertising*

On January 16, 1986, Congressman Wirth filed his statement of candidacy for the U.S. Senate. J.A. 173-74. At that time, Mr. Wirth terminated his ongoing campaign committee for the 2nd Congressional District of Colorado,[7] "and all remaining funds [were] transferred to his designated campaign committee for election to the Senate." *Id.* at 173.

Shortly after announcing that he was running for the Senate, Congressman Wirth aired a series of television advertisements on defense spending and the national budget. Despite a consistent record of opposing increased defense spending, Mr. Wirth stated in one advertisement that " 'we need a strong defense . . . It's expensive, and we have to pay for it. I've been to the Soviet Union, and I've had enough dealing with the Soviets to understand how dangerous they are.' " Blake, "Wirth Walks Narrow Line on Defense Funds," *Rocky Mountain News*, May 11, 1986, at 15.[8] Regarding the budget, Congressman Wirth asserted in another paid advertisement that " '[c]utting the federal budget is our

[7] Mr. Wirth filed his statement of candidacy for reelection to his U.S. House seat on September 23, 1985 (on file at the Federal Election Commission).

[8] Prior to 1986, Congressman Wirth publicly contended that " '[i]t's absolutely criminal the amount of money this country is spending on defense.' " J.A. 168. Congressman Wirth repeatedly spoke out on the allegedly excessive amount of money the Reagan Administration was seeking for national defense. For example, Congressman Wirth was quoted as saying that "[e]ducation should be the best national defense . . . Defense Secretary Casper Weinberger 'never met a missile he didn't like or a toilet seat he couldn't afford.' " Anderson, "Wirth at CU to court student vote," Att. 5 to Exh. 11 of Defendants' Statement of Undisputed Facts.

Most of the cited newspaper articles from the 1980s were appended to Defendants' Statement of Undisputed Facts filed in the district court and thus are in the record of this case.

highest priority and greatest challenge.' " "GOP radio ads target Wirth's voting record," *Denver Post*, Apr. 8, 1986.

Congressman Wirth's public statements triggered a flurry of newspaper editorials debating his votes "against the MX missile, against aid to the anti-communist contras in Nicaragua and against increased aid to the budding democracy of El Salvador, but in favor of a nuclear freeze." "Rep. Tim Wirth on 'wings,' " *Colorado Springs Gazette Telegraph*, Mar. 18, 1986. The media frequently stressed that Colorado's congressional delegation was bitterly divided along party lines on national defense and security issues. "On Their Own," *Grand Junction Sentinel*, Mar. 21, 1986.

2. *The Colorado Party's Public Advertising*

Noting the incongruity between Congressman Wirth's advertisements and his voting record, the Colorado Party decided to sponsor its own advertisement campaign. The Party believed that Congressman Wirth was aggressively attempting to mislead Coloradans by claiming he had favored conservative Republican positions when, in fact, he had pursued liberal Democratic policies. "As the elected spokesman for 535,000 registered Republicans in Colorado, [the Colorado Party chairman felt he had] an obligation to defend Republican philosophy . . . [and] set the facts straight." J.A. 150.

Accordingly, the Colorado Party paid for three radio advertisements and two pamphlets between April 4 and May 30, 1986. The advertisements and pamphlets addressed Congressman Wirth's voting record and past public statements regarding his role in national defense and another controversial issue associated with Congressman Wirth, the AT&T divestiture.[9] All the ads called on

[9] Congressman Wirth chaired the U.S. House Subcommittee on Telecommunications. *Politics in America (1986)* at 240. ("As soon as he took over the [Telecommunications] subcommittee, Wirth began promoting efforts to deregulate the communications industry" in general, and AT&T in particular.) Throughout the early- and mid-1980s, the break-up of AT&T, the creation of regional Bell

Congressman Wirth to stop misrepresenting his official record. J.A. 92.

"Wirth Facts #1," a radio advertisement that aired between April 4 and April 13, 1986, stated in full:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

J.A. 161. The Colorado Party paid $15,000 to air Wirth Facts #1, and reported this payment in disclosure reports timely filed with the FEC. J.A. 93.

The Colorado Party sponsored two other radio spots and published two pamphlets addressing Congressman Wirth's public record which were similar to Wirth Facts #1. J.A. 162-72 . For example, "Wirth Facts # 3," likewise a radio spot, stated:

> Paid for by the Colorado Republican State Central Committee

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operating companies, the rise in local telephone rates, and the imposition of access charges for local telephone calls were issues of intense debate both in Congress and in Colorado. For example, in early 1986, a prominent Denver columnist observed that "[e]veryone I have spoken with thinks that the AT&T divestiture has been a disaster, and that [Congressman Wirth] had a lot to do with it." Greenberg, "Tim Wirth in Catch-22 over image as phone company bad guy," *Denver Post*, Jan. 12, 1986. Other commentators observed that "the [AT&T] divestiture process has received enormous media attention" and "that [the] recent tumultuous changes in the telecommunications industry have caused frustration and confusion." Denvir, "Charges that Wirth broke up AT&T ring false," *Rocky Mountain News*, Jan. 26, 1986.

> There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts.

J.A. 163. The FEC has never disputed that the information communicated by the Colorado Party's advertisements and pamphlets was accurate, fair and important. J.A. 95.

In April 1986, Congressman Wirth had not yet become the Democratic Party's nominee for the U.S. Senate. The first of the advertisements was broadcast more than four months before the Democratic Primary, and the entire advertising campaign was completed more than two months before the primary. At this time, one other Democrat had announced that he was seeking the Democratic nomination and had purchased advertising time on a prominent Denver radio station. Blake, "Dark horse challenges Rep. Wirth," *Rocky Mountain News*, 1986. When the Colorado Party's advertisements aired, there was no way of knowing whether other qualified individuals would decide to seek the Democratic senatorial nomination. *See* Elections Calendar for 1985 and 1986, Att. 14 to Exh. 11 of Defendants' Statement of Undisputed Facts (indicating that prospective candidates had until June 27, 1986, to file primary entrance petitions). Indeed, several

prominent Democrats—including then-governor Richard Lamm and U.S. Rep. Patricia Schroder—were thought to be considering running. J.A. 201.

Likewise, the Republican nominee had not yet been determined when the Colorado Party sponsored the Wirth advertisements. At least three individuals were competing for the Republican nomination during April and May of 1986, and it was not until the Republican State Convention on June 7, 1986, that two of the candidates withdrew and Congressman Ken Kramer received the Convention's endorsement. J.A. 195-96. Mr. Kramer did not become his party's nominee until he won the Republican Primary on August 12, 1986, more than four full months after Wirth Facts # 1 aired.

In addition to holding Congressman Wirth accountable to his legislative record, airing the advertisements served other institutional goals of the Colorado Party, including spurring support and energizing party members. As the then-chair of the Colorado Party later testified,

> If you got a political party that is not seen as aggressively doing its job in holding the other party accountable, and when I saw discrepancies in Tim Wirth's statement[s] let me be sure that [a] large number of activists saw the same things and called me on the phone, and if the party was not responding to that, the fundraising would drop quickly.

J.A. 212.

3. *The Democratic Party's Retaliation*

The Party's advertisements and pamphlets generated significant political discussion. *See* Blake, "Wirth walks narrow line on defense funds," *Rocky Mountain News*, May 11, 1986. Stung, Congressman Wirth's campaign sent letters to many of the 30 radio stations which ran the spots, demanding that the stations provide him with equal response time. Obmascik, "Wirth, GOP renew feud on radio ads," *Denver Post*, Apr. 24, 1986, at 5B. At least one of the radio stations viewed Congressman

Wirth's demand as an attempt " 'to intimidate broadcasters from accepting political advertisements critical of Mr. Wirth's record.' " *Id.*[10]

After the Colorado Party's advertisements aired, Congressman Wirth decided to "run his TV ads for an extra 10 days." "GOP radio ads target Wirth's voting record," *Denver Post*, Apr. 8, 1986. He also broadcast radio spots satirizing the Colorado Party's political spots and vowed to match the Party's expenditures. Obmascik, "Fighting fire with fire: Wirth airs ad satirizing GOP's ads," *Denver Post*, May 10, 1986, at 5C. In an effort to blunt the impact of the Colorado Party's statements, Mr. Wirth spent an additional $35,000 on a newspaper and radio advertising campaign discussing his role in the AT&T breakup. Obmascik, "Wirth ads respond to GOP barbs," *Denver Post*, May 22, 1986.[11]

On June 12, 1986, two months before the Democratic senatorial Primary, the Colorado Democratic Party filed an administrative complaint against the Colorado Party with the FEC. The theory of the complaint was that the Colorado Party's expenses for the three radio advertisements and two pamphlets constituted "expenditure[s] in connection with the general election campaign" within the meaning of § 441a(d). Because the Colorado Party had assigned its expenditure limits to the NRSC, the complaint alleged that the expenditures violated the Act and sought the imposition of civil penalties. J.A. 83-84.

The complaint barely hid its partisan goals of stifling political debate. It asserted that the complaint "should

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[10] At the time, Congressman Wirth was Chairman of the Subcommittee on Telecommunications of the House Energy and Commerce Committee, which had jurisdiction over radio broadcasting legislation and regulation. 1986 Congressional Staff Directory 408 (Charles B. Brownson ed. 1986).

[11] Congressman Wirth's Campaign spent $3,787,202 on the 1986 U.S. Senate race. FEC Press Release at 22 (May 10, 1987). By contrast, the Colorado Party made $1,142,878 in disbursements during the entire 2-year 1985-86 election cycle. (Records on file with the FEC)

operate as notice that [the Party's] spending is accountable under § 441a(d)," and that "*any* [future] spending by the Republican Committee in defiance of those limits will be viewed by complainant as a knowing and willful violation of the FECA requiring FEC referral to the Justice Department." J.A. 83 (emphasis in original). It also noted the Democratic Party's resolve to "pursue this matter fully in cooperation with the FEC." *Id.*

D. FEC Prosecution of the Colorado Party

On November 5, 1986, by a vote of 5-1, the FEC found "reason to believe" that the cost of Wirth Facts #1 was an expenditure "in connection with the general election" and, therefore, caused the Colorado Party to exceed its expenditure limits. J.A. 136-37. However, the FEC dismissed the allegations regarding the Party's other two radio advertisements and the two pamphlets on a 3-3 deadlock vote. *Id.*[12] Almost two years later, the FEC found "probable cause to believe" that the Colorado Party had violated FECA. The FEC proposed a conciliation agreement which would have required the Party to admit guilt and pay a $4,000 civil penalty. J.A. 139. At no time did the FEC explain why the costs for Wirth Facts #1 were subject to § 441a(d)'s expenditure limits and the costs of the other advertisements were not.[13]

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[12] The FEC needs the votes of four commissioners to proceed. *See* § 437c(C).

[13] The Colorado Party is not the only political party that the Commission has prosecuted for allegedly violating § 441a(d) and/or its related reporting requirements. Indeed, in recent years, the FEC has prosecuted and levied civil penalties against at least three other political parties in the following Matters Under Review ("MUR" is the FEC's designation for an administrative enforcement proceeding):

- MUR 3524 (1993)—The Oregon Republican Party admitted guilt and paid a $10,000 civil penalty for failing to properly report expenditures for: (1) a newspaper advertisement published two months before the U.S. Senate primary and seven months before the general election criticizing then-Rep. AuCoin, a declared Senate candidate, for bouncing checks at the House bank; and (2) broadcasting a radio spot one week before the senatorial primary on the same subject.
- MUR 3009 (1990)—The Rhode Island Democratic Party admitted guilt and paid a $1,200 civil penalty for exceeding its spending limits by paying for a newspaper advertisement and purchasing posters for a rally.
- MUR 2983 (1990)—The Illinois Democratic Party admitted guilt and paid a $9,000 civil penalty for exceeding its spending limit by publishing a statewide "Get-out-the-Vote" brochure.

The conciliation agreements between the FEC and the parties are public documents. Petitioners have lodged with the Court copies of the conciliation agreements in the cited MURs.

E. The District Court Proceedings

When the Colorado Party declined to admit guilt and pay a civil penalty, the FEC filed a *de novo* civil action in the United States District Court for the District of Colorado, contending that the expenditures to air Wirth Facts #1 violated § 441a(d). The Commission argued that § 441a(d) applies to any advertisement that contains an "electioneering message" about a "clearly identified candidate," and that Wirth Facts #1 met these criteria. The FEC also contended that the Party's financial reports, although they disclosed its expenditure payments, did not properly classify the expenditures for Wirth Facts #1, in violation of FECA. The Commission sought a civil penalty of $45,000 and a permanent injunction barring the Party from exceeding its expenditure limit in the future. J.A. 57.

The Colorado Party denied that Wirth Facts #1 was an expenditure "in connection with" a general election, noting that it did not "expressly advocate" the election or defeat of a particular candidate. J.A. 61. The Party also counterclaimed, seeking a declaratory judgment that § 441a(d) unconstitutionally restricts the Party's First Amendment rights of free speech and association. *Id.*

During discovery, the Commission refused to state why Wirth Facts #1 was subject to § 441a(d)'s expenditure limitations while the Colorado Party's other advertise-

ments were not. J.A. 97 (stating that "the Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements"); *see also* J.A. 108. The FEC also refused to identify any particular language in Wirth Facts #1 that conveyed an "electioneering message." J.A. 97 (acknowledging that "[n]o Statements of Reasons were issued by any of the Commissioners explaining any of their votes" relating to the Colorado Party). *See also* J.A. 152.[14]

The FEC claimed that it was not legally required to offer any distinction between the Colorado Party's political advertisements, asserting that "the Commission, like any other agency with law enforcement responsibilities, may exercise [] prosecutorial discretion as it or its members deem appropriate." J.A. 108. The FEC also declined to recognize any period of time during Congressman Wirth's entire term of office in which the Colorado Party could have sponsored Wirth Facts #1 without being subjected to § 441a(d)'s expenditure limitations. J.A. 157 ("[N]either the [FECA] nor the Commission's regulations establish any specific cut-off dates. . . .").

Throughout its prosecution of the Colorado Party, the FEC—in both the agency proceedings and in its subsequent civil suit in district court—aggressively sought to discover sensitive information about the Party's internal workings, political strategies, and subjective intent. The FEC was particularly aggressive in seeking information about the Party's rationale for airing Wirth Facts #1.

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[14] The only effort the FEC made to distinguish between the advertisements was the following delphic statement made in response to an interrogatory.

> [C]ounsel for the Commission notes that although the [FEC] Commissioners issued no statements of reasons for their different votes, it *appears* that they voted against finding reason to believe with respect to the other advertisements *primarily* because they *believed* those messages contained no electioneering message.

J.A. 152-53 (emphasis added).

For example, the FEC proffered the following interrogatories to the Colorado Party:

- State the purposes for which the [Colorado Party] was established, and identify all documents and records that evidence, set forth, or describe those purposes. J.A. 131.
- Identify the person or persons who appoint the chairman of the [Colorado Party]. J.A. 133.
- Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1." J.A. 132.
- State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe those purposes. J.A. 132.
- Identify all persons who decided, or participated in the process of deciding, which candidates for federal office the [Colorado Party] would support in 1986. J.A. 134.

In addition, Commission lawyers interrogated the former chairman of the Colorado Party in a sworn deposition and sought answers to the following questions:

- Can you summarize some of your political involvement over the last 20 years or so? J.A. 189.
- What was your involvement in planning campaign strategy? J.A. 195.
- How did the decision to put out [Wirth Facts #1] come about? J.A. 200.
- Who attended the [Colorado Party's] meetings at which [Congressman] Wirth was discussed? J.A. 204.
- Did [the Colorado Party] have an attorney review this script [for Wirth Facts #1 and other adver-

tisements] before putting [them] on the air? J.A. 207.

As noted above, Wirth Facts #1 was aired four months before the Democratic Party chose its nominee for the Colorado Senate seat. Remarkably, the FEC proceeded under the extraordinary presumption that Congressman Wirth was certain to be the Democratic nominee and that the Colorado Party knew this in April 1986 when it aired Wirth Facts #1. J.A. 118.

At the conclusion of discovery, the Colorado Party and the FEC each moved for summary judgment. The district court, three years later and after Mr. Wirth completed his single six-year Senate term, granted summary judgment for the Party. Relying on this Court's precedent construing the term "in connection with" under FECA, the district court ruled that: (1) § 441a(d) limits only expenditures for "express advocacy"; and (2) Wirth Facts #1 did not expressly advocate the election or defeat of any candidate. J.A. 28, 30. The district court, *sua sponte*, dismissed as "moot" the Colorado Party's constitutional challenge to § 441a(d). J.A. 31.

F. The Court of Appeals Decision

The Colorado Party appealed the district court's dismissal of its counterclaim, and the Commission cross-appealed for a ruling that the Party had violated § 441a(d). The FEC did not appeal the district court's finding of fact that Wirth Facts #1 did not constitute express advocacy. *See* Opening Appeals Brief for the Federal Election Commission at 20 n.4.

A panel of the United States Court of Appeals for the Tenth Circuit reversed and remanded, instructing the district court to enter judgment in favor of the FEC and to determine an appropriate civil penalty.

Deferring to its understanding of two of three FEC advisory opinions, the panel held that § 441a(d)'s expenditure limitations apply to any political party spending

that "involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy." J.A. 43-44.

The panel also ruled that Wirth Facts #1 was "in connection with" a general election because it was directed at a clearly identified candidate, Congressman Wirth, and contained an electioneering message. J.A. 44-46. The panel based this ruling on its view that a reasonable person would think that Wirth Facts #1 tended to "diminish" public support for Congressman Wirth and to "garner support" for "the unnamed [and unselected] Republican nominee." J.A. 45. The panel was silent on how Wirth Facts #1 differed from the Colorado Party's other radio advertisements and pamphlets, which the FEC had determined were not limited by § 441a(d)'s spending limits.

Finally, the court of appeals rejected on the merits the Colorado Party's First Amendment challenge to § 441a(d). J.A. 46-48. With no evidence that § 441a(d)'s expenditure limits are necessary to prevent political parties from being corrupting agents, the panel upheld the constitutionality of the spending limits because the restrictions " 'equalize the relative ability of all citizens to affect the outcome of elections' " and help "cap campaign costs and increase accessibility to our political system." J.A. 48. Inexplicably, the panel relied on *Buckley* for that holding, despite the fact that this Court in *Buckley* expressly rejected those grounds for limiting political contributions or expenditures.

The court of appeals also noted that the "primary purpose" of the Act's other contribution and expenditure caps—presumably including those expenditure limits ruled unconstitutional by this Court—is to "prevent corruption or the appearance of corruption." J.A. 46. The panel continued, "[t]he same reasoning the Supreme Court [has] used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political parties."

J.A. 47.[15] Despite the FEC's failure to produce any evidence that state political parties corrupt candidates for federal office—and the Colorado Party's production of affirmative evidence to the contrary—the court of appeals, without legal citation or any factual foundation, concluded:

> [P]arty expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.

J.A. 47. Thus, the court of appeals effectively shifted the burden of proof to the Party to explain why parties cannot be corruptive.

On August 7, 1995, the Colorado Party filed a suggestion for rehearing *en banc*. On September 6, 1995, the court of appeals denied the Party's suggestion, with Judges Baldock, Ebel and Kelly voting for rehearing and Judge Lucero recused. J.A. 49-50. On September 21, 1995, the Colorado Party filed a petition for a writ of certiorari. This Court granted the Colorado Party's petition on January 5, 1996. 64 U.S.L.W. 3447.

SUMMARY OF ARGUMENT

1. Section 441a(d) violates the First Amendment of the Constitution because it unjustifiably limits the amount of political expression that political parties may undertake. The Colorado Party's use of publicly disclosed, voluntarily donated and legally restricted funds to finance political advertising is a quintessential exercise of political speech and association protected by the First Amendment.

Buckley v. Valeo and its progeny establish that the government bears a heavy burden when it seeks to limit expenditures for political speech. To uphold § 441a(d),

[15] Like the district court, the court of appeals concluded that Wirth Facts #1 did not constitute "express advocacy." J.A. 44 n.10.

the government must prove that the limitation is necessary to achieve a compelling governmental interest and is narrowly tailored to that interest. In addition, the government must establish that the recited harms are real, and that the statute will alleviate the harms in a direct and material way.

The government's burden is particularly heavy here because the legislatively manifested reason for § 441a(d) is not to prevent corruption or the appearance of corruption but to cap campaign-related spending and equalize speech. These latter justifications were held constitutionally illegitimate in *Buckley*. The government's burden also is very high because § 441a(d) places extreme limits on political party speech. The statute makes it impossible for the Colorado Party to send a single letter to every voting age citizen in the state.

The government has not and cannot meet its burden regarding § 441a(d) The government has offered literally no evidence that § 441a(d) was intended to prevent actual corruption or the appearance of corruption, or that it does or could serve those purposes. In fact, § 441a(d) does not serve any anti-corruption purpose because (i) other provisions of FECA insulate the parties from corruptive influences, and (ii) any effect the parties may have on candidates constitutes democracy, not corruption.

The FEC's attempt to relabel § 441a(d) as a "contribution" limit does not avoid the First Amendment violation. *Buckley* gave less protection to contributions then to expenditures because contributions are merely general expressions of support for a candidate and his views and do not communicate the underlying basis of support. Section 441a(d), however, targets specific expressions of party views—pure speech. *Buckley* also stressed that contributors may engage in unlimited independent speech. Unlike individuals and every other political association, political parties are stringently limited by § 441a(d) in what they can say in connection with an election.

2. The FEC's interpretation of § 441a(d) is vague and violates the First Amendment. This Court's decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), established an objective bright-line test: "express advocacy." Instead of adopting the "express advocacy" standard, which has explicit meaning, the FEC instead interprets § 441a(d) to apply to any party speech that contains an "electioneering message." That "standard" is ill-defined, open-ended and subjective. It requires *post-hoc* analysis by the FEC, which intrusively investigates alleged violations of § 441a(d) by examining the subjective intent of the speaker and the subjective interpretation of the audience. Indeed, the FEC even seeks to reinterpret "express advocacy" to encompass implied advocacy, distorting this Court's holdings and creating unconstitutional vagueness.

3. Properly interpreted, § 441a(d) limits spending by political parties only if the speech contains words that expressly advocate the election or defeat of a clearly identified candidate. The FEC's "electioneering message" standard is unworthy of deference because it raises substantial constitutional concerns. Moreover, traditional tools of statutory construction, including the presumption that the same words in the same statute have the same meaning, clearly establish that § 441a(d) limits only express advocacy, thus eliminating any ambiguity for the FEC to resolve. The FEC's interpretation of § 441a(d) is further undeserving of deference because it is based on inconsistent, unreasoned Advisory Opinions and because FECA itself forbids the FEC to establish any rule of law except through rulemaking procedures not followed here.

ARGUMENT

I. SECTION 441a(d)'S STRINGENT LIMIT ON THE ABILITY OF POLITICAL PARTIES TO SUPPORT OR OPPOSE POLITICAL CANDIDATES VIOLATES THE FIRST AMENDMENT.

No previously challenged FECA expenditure limitation imposed upon individuals, political associations or non-business entities has survived First Amendment scrutiny in this Court. *See Buckley*, 424 U.S. at 59 n.67 (striking restrictions upon (1) the expenditure of personal funds by candidates for federal office, (2) the expenditure of more than $1,000 in personal funds by other individuals, and (3) the expenditure of more than a set amount of campaign funds by candidates for federal office); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497-501 (1985) ("*NCPAC*") (striking restriction upon independent expenditures by PACs); *FEC v. Massachusetts Citizen for Life, Inc.*, 479 U.S. 238, 268 (1985) ("*MCFL*") (striking restrictions upon independent expenditures by incorporated political associations).

The stringent limit imposed by § 441a(d) on the ability of political parties to speak out in support of their own candidates is at least as offensive to the First Amendment as these other limitations and merits a similar fate. It is unthinkable that the Colorado Party should be prohibited from sending so much as a single letter to each voter registered for the 1986 Senate election or, indeed, to each of its own members in connection with a federal election. However, this is precisely the effect of this statute.

No First Amendment challenge to § 441a(d) was presented in *Buckley*. This Court, however, perceived the First Amendment issue and made clear that the issue survived the Court's disposition of a Fifth Amendment claim. 424 U.S. at 58 n.66. The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by

§ 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement actions. *See* J.A. 68. The reality of this threat is confirmed by this case, in which the Colorado Party finds itself under attack even though it sought to comply with § 441a(d).

Because § 441a(d) unjustifiably cuts off vital political speech, it is void. The statute violates the First Amendment, no matter how narrowly "in connection with" may be construed.

A. Section 441a(d) Infringes Upon Core First Amendment Freedoms of Speech and Association.

By forbidding state parties from spending more than pennies-per-voter "in connection with" a general election, § 441a(d) strikes at freedoms at the heart of our democratic process. The First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). It assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Thus it "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

Limiting the funds that a party can spend on political speech is no different than limiting political speech itself. *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). As this Court held in *Buckley*,

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, id. at 19. "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* n.18. Thus, § 441a(d) must stand or fall as a direct limitation on the core First Amendment right to engage in political speech.

In addition to restricting speech, § 441a(d) also infringes upon the freedom of association guaranteed by the First Amendment. *Id.* at 23. The right to associate with the political party of one's choice is "an integral part" of the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). Elections are "the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Tashjian*, 479 U.S. at 216). Therefore, limitations upon public debate are "particularly egregious where the state censors the political speech a political party shares with its members." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring)). Indeed, the freedoms of speech and association in this context are mutually dependent, for the "pooling" of contributions is "often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66; *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) ("The two rights overlap and blend. . . .").

Section 441a(d) impairs associational rights in at least two ways. First, party members are restricted in their joint speech to the public at large. Even more egregiously, the limits are so low that parties cannot even communicate freely with their own members, a right FECA allows even to corporations, unions, and PACs, as well as other political organizations. *See* § 431(9)(B)(iii).

B. Section 441a(d) Is Void Unless the Government Proves That the Restriction Is Necessary to Achieve a Compelling State Interest and Is Narrowly Tailored to That Interest.

Because § 441a(d) so clearly infringes upon core First Amendment freedoms of speech and association, it may be upheld only if the government proves that the restriction is necessary to achieve a compelling state interest and that the restriction is narrowly tailored to that interest. *MCFL*, 479 U.S. at 263. Such strict scrutiny requires the production of rigorous and exacting proof.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must *demonstrate* that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1017 (1995) (emphasis added) (quoting *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994)); *see also NCPAC*, 470 U.S. at 499 ("A tendency to demonstrate distrust of PACs is not sufficient.").

C. The Government's Burden of Justifying § 441a(d) Is Particularly High.

Several considerations require that the government's defense of § 441a(d) be held to a particularly high standard of proof.

1. *Section 441a(d) Was Enacted for the Unconstitutional Purposes of Reducing and Equalizing Speech.*

FECA's legislative history makes clear that campaign spending limitations were intended to reduce the overall level of political spending and to equalize the strength

of political voices, including those of political parties.[16] The only significant treatment of party spending limits was in the legislative history of the 1974 Amendments to FECA that enacted § 441a(d). Pub. L. 93-443, 88 Stat. 1265-66 (1974). That congressional debate occurred in connection with Senate amendments 1102 and 1152, which removed and then reinstated § 441a(d) into the bill. *See* 120 Cong. Rec. S5411-15 (daily ed. Apr. 8, 1974) (statements of Senators Clark, Brock and Cannon). These debates make clear that § 441a(d)'s limits were enacted in order to close a perceived "loophole" in the other campaign spending limitations imposed on campaigns, which were subsequently declared unconstitutional in *Buckley*. Thus § 441a(d) is the product of the constitutionally suspect congressional goals of reducing and equalizing speech. Indeed, the court of appeals relied on these purposes to sustain § 441a(d). *See* J.A. 222-24.

These objectives, however, are flatly unconstitutional. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57. Since § 441a(d) was expressly adopted for an unconstitutional purpose, any other proffered justifications must be met with deep skepticism.

2. *Section 441a(d) Places Extraordinary Burdens Upon Speech by Political Parties.*

The government's burden also is very high because of the severity of the restrictions on core First Amendment activity imposed by § 441a(d). *See Buckley*, 424 U.S. at 19-21 (recognizing that the level of scrutiny is affected by the magnitude of the burden upon First Amendment rights). Section 441a(d) prohibits the Colorado Party from spending more than pennies-per-potential-voter in the state. This sum is far less than the cost of first class

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[16] *See Buckley*, 424 U.S. at 25-26; H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 6 (1974); 120 Cong. Rec. S4460-61 (daily ed. March 26, 1974) (statements of Senators Clark and Hathaway); 120 Cong. Rec. S5539 (daily ed. Apr. 9, 1974) (statement of Senator Taft).

postage necessary to send one letter to every voter in the state (not including the costs of designing, sorting, stuffing, addressing and printing those letters). In this respect § 441a(d) effectively insulates incumbents from criticism by an opposing party. While parties are restricted by federal law from supporting or opposing candidates for federal election, incumbents (like then-Congressman Wirth), through their franking privileges, are able to communicate to voters with a government subsidy. *See* 39 U.S.C. § 3210 (1994).

The limitations imposed by FECA also infringe upon a political party's ability to attract new voters to its causes and candidates, as well as upon its ability to communicate with its own members. By not permitting the Party to pay the cost of first class postage for one mailing to every party member in the state, § 441a(d) infringes upon the Party's constitutional right to communicate with its members. *Cf. Eu*, 489 U.S. at 224. Ironically, corporations, PACs, political organizations and unions are able to communicate to their members as much as they desire without any spending limit. *See* § 431(9)(B)(iii). Such disparate treatment is perverse and unconstitutional.

D. The Government Has Not Met Its Heavy Burden.

1. *The Government Has Offered Literally No Evidence That § 441a(d) Is Necessary to Achieve a Compelling State Interest.*

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. Despite repeated challenges by the Colorado Party and the requirement of Federal Rule of Civil Procedure 56 that the government submit whatever evidence it intended to rely upon, *the government offered literally no evidence that the limitations imposed by § 441a(d) are necessary to achieve this compelling governmental interest.*[17] In fact,

[17] In moving the district court for summary judgment, the Commission first noted the statement in *Buckley* that large contributions given to secure *quid pro quo*'s may undermine the integrity of our political system. It then continued,

> Defendants have pointed to no reason why contributions in the form of coordinated expenditures by state political parties pose no similar risks. Certainly a *quid pro quo* owed by an elected official to a state party official is no less corrupting than one owed to any other individual. . . . Defendants have presented no circumstances or justification which would give them a constitutional right to purchase extra influence over elected officials.

Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment, at 5-6. This argument erroneously equates political parties—which are broad-based groups of like-minded individuals—with narrow, wealth-generating interests.

Before the court of appeals, the Commission first argued that it did not have to present evidence of corruption, then noted historical examples of party corruption. *See* Opening Appeals Brief for the Federal Election Commission at 26-27. As noted in footnote 20, *infra*, these examples are wholly irrelevant to *modern* political parties.

the Commission has stated during this litigation that it made "no findings or allegations concerning the appearance of corruption." J.A. 111. This failure of proof, in itself, is fatal to any defense of §441a(d).

Further, the government has identified no congressional findings—or even suggestions—in the legislative history of FECA that political parties are a corruptive influence on candidates. To the contrary, the legislative history of FECA reflects a very positive view of political parties and their place in American politics. *See, e.g.*, S. Rep. No. 689, 93d Cong., 2d Sess. 7-8, 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5593-94 & 5601. Indeed, the government's *inferred* anti-corruption legislative purpose is refuted by the *express* reasons for § 441a(d), which were to uphold FECA's constitutionally disfavored goals of equalizing resources and capping campaign spending. Thus, the government has done no more than "posit the existence of the disease sought to be cured," an insufficient showing to meet constitutional muster. *See National Treasury Employees Union*, 115 S. Ct. at 1017 (quoting *Turner Broadcasting System*, 114 S. Ct. at 2450).

2. *In Fact, § 441a(d) Is Not Necessary to Prevent Corruption or the Appearance of Corruption.*

The government has been unable to prove that a limitation upon party expenditures is necessary to prevent corruption because modern political parties do not "corrupt" elected officials. When parties engage in political expression, they are nothing more than groups of individuals who have combined their legally restricted resources in order to maximize the impact of their individual voices. Such "pooling" is at the core of First Amendment protection. *See Buckley*, 424 U.S. at 65-66. Any effect that political parties might have on candidates through their speech and associational activities is "democracy," not "corruption." *See NCPAC*, 470 U.S. at 498.

A modern political party has no reason to corrupt public officials for an economic benefit. Parties themselves do not generate wealth from commercial activities or possess independent economic interests. Indeed they are prohibited from using commercial means to finance their political activities.[18] Moreover, the stringent limit on sources of party funds and the comprehensive requirements of public disclosure prevent any theoretical use of parties as a conduit for corruptive payments.

The sorts of patronage practices which brought economic benefit to parties and their members are relics of a different era, which predates FECA by almost a century. Civil service laws and laws regulating government procurement, a free investigative press, direct primaries and the rise of candidate-centered politics, among other factors, have taken away the spoils system which characterized nineteenth century party politics.[19] It is no

[18] The sale of any items by a party are subject to the definition of "contribution." *See* 11 C.F.R. § 100.7(a)(2). Thus, even purchases of buttons or other campaign paraphernalia from a party are subject to contribution limits, must be disclosed, and may not be made by prohibited sources such as corporations or unions.

[19] *See, e.g.*, James L. Sundquist, *Party Decay and the Capacity to Govern, in The Future of American Political Parties* 47-49 (Joel L. Fleishman ed. 1982); *see also* Frank J. Sorauf & Scott A. Wilson,

accident, therefore, that the only "proof" of corruption that the FEC has offered during this entire litigation has been from such bygone eras.[20]

Nor can party expenditures be equated with the types of "corruption" that may be attributed to the effects of corporate or union wealth. Because political parties are "formed for the express purpose of promoting political ideas and cannot engage in business activities," their "political resources reflect political support." *MCFL*, 479 U.S. at 264; *Austin*, 494 U.S. at 662 (quoting *MCFL* at 264). In this respect, parties are quite different from corporations, which have the capability to convert their success in the economic marketplace into a voice amplified beyond its actual political support. In fact, political parties are much further removed from potential corruption than are corporate and union PACs, which are free to make unlimited independent expenditures in

Campaigns and Money: A Changing Role for the Political Parties?, in The Parties Respond 198-99 (L. Sandy Maisel ed. 1990); Gary R. Orren, *The Changing Styles of American Party Politics, in The Future of American Poliitcal Parties* 32 (Joel L. Fleishman ed. 1982).

[20] In its opening brief to the court of appeals, the FEC listed "such notorious examples of corrupt political organizations as Boss Tweed and the Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880's, Teapot Dome, the Pendergast Machine, and Watergate." *See* Opening Appeals Brief for the Federal Election Commission at 27 n.6. This was the *first and only* occasion during the more than ten years of this litigation that the Commission has identified any support for its view that political parties can be corruptive.

The only modern example of purported party corruption cited by the FEC is the Watergate scandal, which in fact supports Petitioners' position that political parties reduce corruption by limiting candidate dependence upon special interests. The abuses of the 1972 Nixon campaign involved money flowing to the Committee to Reelect the President, and did not implicate the Republican Party, its Chairman, or other party officials. *See* U.S. Dept. of Justice, *Watergate Special Prosecution Force Report* (Oct. 1975); S. Rep. No. 981, 93d Cong., 2d Sess. 18-20 (1974) (Senate Watergate Committee Report).

spite of the fact that they are organized around the sponsoring corporation's or union's specific economic interests and can rely upon corporate and union wealth for general operating expenses. *See* § 441b; 11 C.F.R. Part 114. Therefore, the government has far less justification for infringing upon the First Amendment rights of political parties.

Any other theory of political party "corruption" assumes two levels of corruption: (1) that other interests will corrupt parties, and (2) that the parties will then corrupt elected officials. However, such indirect corruption is totally implausible. FECA already imposes significant checks upon potential corruption of the parties themselves. Like candidates and PACs, parties are subject to contribution limits, may not receive corporate or union contributions, and must report to the FEC all contributions and expenditures, making it extremely difficult to corrupt the parties. *See* Statement of the Case § B, *supra*. As this Court explained in *Buckley*,

> The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [then] § 608(c)'s campaign expenditure ceilings.

424 U.S. at 55.

Unlike corporations, unions and their PACs, political parties represent an extraordinarily broad range of interests. As such, the parties are not captive to narrow economic interests which are often viewed as corruptive. Moreover, because American political parties necessarily focus upon building majorities, they are unwilling to make financial support contingent upon a candidate's position on any one particular issue.[21] Therefore,

[21] *See, e.g.*, David E. Adamany, *Political Parties in the 1980's, in Money & Politics in the United States* 112 (Michael J. Malbin ed. 1984) ("It would be difficult under any but the most extreme circumstances for a party to refuse resources to a party incumbent, despite his independence on many policy issues. A congressman of the opposition party, elected because the party had withdrawn support from the incumbent, would certainly not be more congenial on policy. And his vote would be assured to help the opposition party organize the chamber, dominate committee action, and support the opposition leadership on procedural and rules votes."); Gary R. Orren, *The Changing Styles of American Party Politics, in The Future of American Political Parties* 26 (Joel L. Fleishman ed. 1982) ("[T]he party will be reluctant to punish uncooperative members and thus threaten their own margins in Congress.").

> As a source of campaign funds, American parties probably constitute the cleanest money in politics. They derive funds from individuals and organized interests. But their mix of sources is more diverse than that of any other major organization. As a result, parties are relatively free of special-interest influence. A candidate's integrity is seldom threatened in accepting party funds for a campaign. Parties are probably the least demanding mistress in politics. Normally, the parties' main expectation of candidates is that they will run effective campaigns and that when elected they will support the party position when their constituency and conscience permit it.[22]

Far from preventing the appearance of political corruption, § 441a(d) fosters it by reducing the role of broad-based parties and expanding the influence of narrow interest PACs.[23] Unshackling political parties would "re-

[22] John F. Bibby, *Campaign Finance Reform: Expanding Government's Role or the Parties' Role?*, Commonsense 1, 10 (Dec. 1983) ("A more promising avenue of reform would be encouraging a larger role for the political parties in campaign finance."); *see also* Herbert E. Alexander, *Financing Politics* 172 (4th ed. 1993) ("FECA could be amended in ways that would strengthen the parties . . . including, first, the elimination of limits on party committee spending on behalf of candidates."); Larry J. Sabato, *The Party's Just Begun* 223 (1988) ("The less party money there is available, the more candidates will have to rely upon PAC money; the more resources the parties can share with their nominees, the less officeholders will be indebted to special interest groups.").

[23] Unlike political parties, PACs have had a marked tendency to favor incumbents with their contributions. For instance, the 349 House incumbents running in the 1992 general election received more than $89 million from PACs, while the 314 challengers re-

duce[] the candidate's dependence on outside . . . coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." *Buckley*, 424 U.S. at 53 (footnote omitted).

E. The Government's Attempts to Portray Party Expenditure Limits as Contribution Limits Are Unavailing.

As explained above, the long line of this Court's decisions interpreting FECA and other campaign finance laws makes clear that this limitation upon party expenditures, like the limitations upon expenditures by individuals, candidates, PACs and other political organizations, is unconstitutional. Recognizing the reasoning in those decisions that limitations on the amount of political contributions are less burdensome, and hence of comparably less constitutional significance, than limitations on political expenditures, the government has repeatedly argued that the expenditures at issue here should be treated as contributions. *See, e.g., Buckley*, 424 U.S. at 20-21. However, the government's position on this point is untenable.

Based upon its plain meaning, § 441a(d) explicitly prohibits the parties from making any "expenditure" in excess

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ceived less than $11 million. Jamin Raskin & John Bonifaz, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections," 94 Colum. L. Rev. 1160, 1176 (1994). Even in 1994, a year in which challengers were unusually successful at the ballot box, PACs gave more than $137 million to incumbent Senators and Representatives, while giving less than $19 million to challengers. FEC Press Release at 3 (Mar. 31, 1995). The disparity in PAC contributions is particularly dramatic between incumbents in the majority and challengers in the minority. For example, in 1988 Democratic incumbents in the House received almost 25 times more money from PACs than did Republican challengers. David B. Magleby & Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* 81-84 (1990). In contrast, the two major political parties contributed $1,812,757 to House and Senate challengers in the 1986 election, while contributing $1,949,821 to incumbents. FEC Press Release at 3 (May 10, 1987). *See generally* Lillian R. BeVier, "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform," 73 Cal. L. Rev. 1045 (1985).

of the statutory formula. In apparent recognition of this fact, this Court in *Buckley* specifically included the limit upon party spending in a list of challenged sections of FECA which were "expenditure" limitations. 424 U.S. at 39. That FEC regulations treat all party expenditures as "coordinated," *see* 11 C.F.R. § 110.7(b)(4), cannot alter this result, for the distinction is one of constitutional origin completely unaffected by agency action.

More fundamentally, regardless of whether the label "expenditure" or "contribution" is attached to the party's speech, the nature of the party conduct being restricted makes clear that the same protections must be afforded here as were afforded to the expenditures in *Buckley*, *MCFL*, and *NCPAC*. The Court explained in *Buckley* that a contribution warrants less constitutional protection than an expenditure in part because it "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 21. But Wirth Facts #1, like expenditures on speech made by candidates, individuals, PACs, and other political organizations, communicated exactly the basis for the Party's view, namely that Congressman Wirth had not been forthcoming with Colorado voters. Thus, the Colorado Party's advertising expenditures were not mere "proxy speech" like contributions, and they deserve the same protection as other direct political speech.

The other rationale for the constitutional distinction between expenditures and contributions also leads to the inescapable conclusion that § 441a(d) must be judged—and struck down—as an expenditure limit. *Buckley* noted that a contribution limit is less burdensome because it "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe upon the contributor's freedom to discuss candidates and issues." *Id.* at 21. But political parties, unlike all other political entities, are prohibited by FECA from making unlimited independent expenditures. *See* 11

C.F.R. § 110.7(b)(4). That prohibition, combined with § 441a(d)'s spending limits, precludes parties from publicizing their views. Thus, § 441a(d) has the same debilitating effects on the political parties as the prior limits which were struck down by this Court had on spending by candidates, individuals, and other political organizations, and must meet the same fate.

* * * *

Section 441a(d) limits political speech which is not corruptive and does not have the appearance of corruption. The government has not offered any evidence which would justify restricting this core First Amendment activity. Therefore, § 441a(d) must be declared unconstitutional.

II. THE FEC'S "ELECTIONEERING MESSAGE" STANDARD AND ITS INTERPRETATION OF THIS COURT'S "EXPRESS ADVOCACY" TEST ARE UNCONSTITUTIONALLY VAGUE.

In addition to imposing an unjustified burden on core First Amendment political speech, the "in connection with" language of § 441a(d) does not provide the clear and precise guidance that the Constitution requires. The FEC does not dispute this point, but contends that the "electioneering message" standard adopted by the court of appeals cures any vagueness problems. In fact, if § 441a(d) is construed to adopt the "electioneering message" standard, it is void for vagueness.

A. Vagueness Concerns Are Most Acute When Statutes Imperil the Free Exercise of Fundamental First Amendment Rights.

Where First Amendment rights are affected, "[p]recision of regulation must be the touchstone." *Edenfield v. Fane*, 113 S. Ct. 1792, 1803-04 (1993). Unless regulations are drafted with "narrow specificity," protected activity will be deterred as speakers "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41

n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[24]

B. Only if § 441a(d) Is Limited to "Express Advocacy" as Articulated by This Court in *Buckley* and *MCFL* Can Constitutional Vagueness Concerns Possibly Be Overcome.

The court of appeals in *Buckley* sought to cure the vagueness of portions of FECA through a narrowing construction resulting in a standard requiring " 'advocating the election or defeat of' a candidate." *Buckley v. Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975). This Court reversed, holding that greater precision and clarity were required to avoid unconstitutional vagueness. *Buckley*, 424 U.S. at 42. The Court held that at the very least, "explicit words of advocacy of election or defeat" are required. *Id.* at 43.[25] Such a bright line was required because

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates cam-

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[24] As this Court has repeatedly observed, the guarantees of the First Amendment are "delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (when vague statutes interfere with the free exercise of fundamental rights, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibilty that [the] protected speech of others may be muted . . . .").

[25] The Court indicated that the following explicit terms satisfied the demanding "express advocacy" standard: " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " *Buckley*, 424 U.S. at 44 n.52. Even with this narrowing construction, the Court struck down former § 608(e)(1), one of the provisions to which the court of appeals had applied its narrowing construction, as facially unconstitutional under the First Amendment. *Id.* at 51.

> paign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

Buckley stressed that a standard turning on the speaker's purpose or the listener's understanding is not sufficient.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation *puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.*

Buckley, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) (emphasis added).[26] *MCFL* adopted this analysis and held that, to be adequately clear, the standard must be limited to "pointed exhortations to vote for particular persons." *Id.* at 249. *See also id.* (the communication must contain an "explicit directive" to vote for or against a particular candidate).

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[26] The Court also used the "express advocacy" standard in *Buckley* to narrowly construe former § 434(e) (now § 434(c)(1)), which requires every person (other than a political committee or candidate) who makes contributions or expenditures aggregating over $100 to file a disclosure statement with the FEC. Although FECA defined "contributions" and "expenditures" as providing money or other valuable assets "'for the purpose of . . . influencing' an election," the Court nevertheless found "serious problems of vagueness." *Id.* at 76-77.

C. The FEC's "Electioneering Message" Standard Is Hopelessly Vague, Open-Ended and Subjective, and Therefore Violates the Constitution.

The FEC contended below, and the court of appeals here held, that the bright-line rule established by *MCFL* and *Buckley* should not be applied to § 441a(d) and that an "electioneering message" test should be adopted instead. According to the court of appeals, an "electioneering message" is one reflecting a "design" or "purpose" of "influencing the outcome" of an election and would be so understood by a "reasonable" reader. J.A. 45-46. Thus, the courts of appeals here adopted a standard very similar to the one accepted by the court of appeals in *Buckley* and rejected by this Court. The vagueness of the "electioneering message" standard is manifested by the FEC's repeated failure—during nearly ten years of litigation—to distinguish between Wirth Facts #1, which the Commission contends falls within the standard, and the Colorado Party's other advertisements, which the Commission found did not.

Vagueness also invites intrusive and unjustified government investigation of a political party's conduct and motives. In implementing the vague and subjective "electioneering message" standard, the FEC below sought and obtained discovery from the Colorado Party concerning:

- The identity of the Party official who decided to make Wirth Facts #1. J.A. 199.
- The subjective reason(s) why the Party (and its representatives) decided to make Wirth Facts #1. J.A. 201.
- The general political context in which Wirth Facts #1 was made, including judgments as to who was likely to emerge as the candidate of the Democratic Party. J.A. 196-98.
- Whether any voters might find a given fact in Wirth Facts #1 sufficient to motivate, in whole or in part, a vote for or against any candidate. J.A. 200-01.

In short, the "electioneering message" formulation boils down to a classic "totality of the circumstances" test in which the answer can never be known in advance. The Court held this kind of *post-hoc* inquiry unacceptable in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 794 (1988), because it "necessarily chill[s] speech in direct contravention of the First Amendment's dictates." Under *Riley*, *Buckley*, and *MCFL*, the "electioneering message" standard must be rejected. Only the standard of express advocacy could cure the vagueness of § 441a(d).

D. The FEC's Recent Expansive and Baseless Interpretation of This Court's "Express Advocacy" Standard Is Also Unconstitutionally Vague.

By "express advocacy" the Colorado Party means *express* advocacy, and not the concept of implied express advocacy which the FEC has sought to impose by adjudication and, most recently, by rulemaking.

On July 6, 1995, the FEC issued a definition of "express advocacy," which states:

> Expressly advocating means any communication that . . . [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because . . . [r]easonable minds could not differ as to whether [the communication] encourages actions to elect or defeat one or more clearly identified candidate(s) or *encourages some other kind of action.*

11 C.F.R. § 100.22(b)(2) (emphasis added).[27]

Although the FEC's new revised definition purports to clarify the kinds of communications that constitute "express advocacy," the definition clearly encompasses implied as well as express meanings, and sanctions a broad, *post-hoc* investigation into undefined "external events." This new definition is merely the Commission's latest attempt to import the same open-ended "electioneering message" standard into FECA under the guise of "express advocacy."[28]

[27] The FEC's revised definition went into effect on October 5, 1995.

* * * *

The FEC's "electioneering message" standard and its broad and unfounded interpretation of "express advocacy" create treacherous vagueness problems. In order to avoid constitutional vagueness, § 441a(d)—at the very least—must be limited to communications that satisfy *this Court's* strict, bright-line "express advocacy" standard.

III. THE FEC'S INTERPRETATION OF § 441a(d) IS ENTITLED TO NO DEFERENCE.

If the First Amendment allows the government to forbid political parties from spending more than pennies-per-voter "in connection with" a general election—and it does

[28] In addition to the promulgation of this new regulation, the FEC's attempts to expand the definition of "express advocacy" into "implied advocacy" are longstanding and well documented. *See, e.g., Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir.) (rejecting the FEC's contention that a newsletter identifying candidate positions on abortion issues but explicitly refusing to endorse any candidate was express advocacy), *cert. denied sub nom. FEC v. Keefer*, 502 U.S. 840 (1991); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) ("[T]he FEC would aparently have us read 'expressly advocating' . . . to mean for the purpose, express *or implied*, of encouraging election or defeat . . .") (emphasis in original); *id.* ("[C]ontrary to the position of the FEC, the words 'expressly advocating' mean[] exactly what they say."); *FEC v. Christian Action Network*, 894 F. Supp. 946, 952 (W.D.Va. 1995) (Rejecting the FEC's position that one commercial was express advocacy because the only immediate action called for by the commercial was for viewers to call [the Defendant] if they agreed with the Defendant's opposition to a 'gay rights agenda.'"); *FEC v. NOW*, 713 F. Supp. 428, 434 (D.D.C. 1989) ("NOW's letters do not contain pointed exhortations to vote for or against particular persons. The three mailings include no explicit words directing the reader how to vote."); *FEC v. AFSCME*, 471 F. Supp. 315, 316-17 (D.D.C. 1979) (rejecting the FEC's position that a poster depicting President Ford and excerpting Ford quotation, "I can say from the bottom of my heart—the President of the U.S. is innocent and he is right," was express advocacy).

not—the settled First Amendment principles discussed above mandate that the "in connection with" language of § 441a(d) be given a narrow and precise construction. Misapplying *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984) (*"Chevron"*), the court of appeals rejected the clear and objective "express advocacy" standard announced in *Buckley* and *MCFL*, concluding instead that it must "defer" to an uncertain and subjective "electioneering message" standard supposedly adopted in two of three conflicting FEC advisory opinions. J.A. 41-44.

This ruling was fundamental error. Even if the FEC were "the type of agency" that merits *Chevron* deference under certain circumstances, *see DSCC*, 454 U.S. at 37, the FEC's expansive interpretation of § 441a(d), which raises grave constitutional concerns, is not entitled to *Chevron* deference. In addition, these FEC advisory opinions are not the type of agency decisions to which courts should defer. Instead, this Court should apply traditional tools of statutory construction and read § 441a(d) to apply only to "express advocacy."

A. Deference Is Not Appropriate Because the FEC's Interpretation of § 441a(d) Raises Substantial Constitutional Concerns.

As a general matter, administrative agencies are not competent to resolve constitutional issues. *See Ostereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Public Utilities Comm. v. United States*, 355 U.S. 534, 539 (1958). Instead, "the federal judiciary is supreme in the exposition of the law of the Constitution. . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In particular, where First Amendment interests are involved, not even Congress can "limit judicial inquiry," *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989), or excuse the court from the "task of assessing the First Amendment interest at stake and weighing it against the public interest." *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 91 (1977).

Therefore, an agency's interpretation of a statute is not entiled to deference if it raises "serious constitutional questions." *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). In such a case, any predicate for *Chevron* deference evaporates and the courts must "independently" decide what the Constitution requires.

> Even if the [agency] construction of the Act were thought to be a permissible one, we are quite sure that . . . we must independently inquire whether there is another interpretation not raising these serious constitutional concerns. . . .

DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 577 (1988); *see also Miller*, 115 S. Ct. at 2491 ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.") (citing *DeBartolo*, 485 U.S. at 574-75); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("We are obligated to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress. Accordingly, the Commission is not entitled to *Chevron* deference with regard to its interpretation of the statute.") (citing *DeBartolo*, 485 U.S. at 575).

As explained above, even if § 441a(d) were constitutional on its face, the FEC's interpretation of that statue raises insurmountable vagueness concerns. Accordingly, deference is wholly inappropriate.

B. Traditional Tools of Statutory Construction Establish That § 441a(d) Limits Only "Express Advocacy."

Three traditional tools—*stare decisis*, the presumption that the same words in the same statute have the same meaning, and the presumption that statutes should be construed so as to avoid constitutional problems—establish that the phrase "in connection with" means "express advocacy." *See Chevron*, 467 U.S. at 843 n.9.

1. Stare Decisis *Establishes That Identical and Similar Language in Related FECA Provisions Means "Express Advocacy."*

FECA is over 20 years old. As with any statute with such a history, construction does not proceed on a blank slate. To the contrary, where this Court has declared the meaning of a provision, that holding is authoritative. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

MCFL holds that FECA's standard of "in connection with" a general election, as it is used in the prohibitions on corporate, bank, and union expenditures in § 441b, means "express advocacy." 479 U.S. at 248-49. *Buckley* holds that similar language used in FECA concerning expenditures "relative to" a clearly identified candidate and "for the purpose of . . . influencing" a federal election mean "express advocacy." 424 U.S. at 42, 80. Under the traditional tool of *stare decisis*, these holdings are fixed points from which analysis of the remainder of FECA may proceed.

2. *The Presumption That the Same Words in the Same Statute Have the Same Meaning Gives a Clear Meaning to § 441a(d).*

Statutes properly are interpreted as a whole. *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). Where the same language is used in the same statute, it is presumed to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Thus, the "in connection with" language of § 441a(d) presumptively has the same meaning of "express advocacy" that this Court authoritatively gave to identical language in § 441b.

The court of appeals noted that this presumption is not controlling if identical words "are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." J.A. 39 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). However, no

such dissimilar circumstances exist here. The "in connection with" language in both § 441a(d) and § 441b serves the identical function of specifying the necessary link between an expenditure and an election. Moreover the dominant concern giving rise to the "express advocacy" standard was to provide a clear and objective guideline for those who plan to engage in political speech. *Buckley*, 424 U.S. at 42, 80. This concern is equally applicable to § 441a(d), for there is no reason to believe that political parties making expenditures are any less in need of a clear standard than corporations and unions (*MCFL*) or individuals (*Buckley*).

Apparently starting from the premise that speech by political parties merits less First Amendment protection than speech by corporations, banks or unions, the court of appeals reasoned that Congress theoretically could have decided to impose a different standard in § 441a(d) than in § 441b. J.A. 39-41. However, there is no evidence that Congress, in using identical language, actually intended different standards to apply.

3. *Section 441a(d) Must Be Interpreted So as to Avoid the Serious Constitutional Problems That Would Result from an "Electioneering Message" Standard.*

The presumption that statutes should be construed so as to avoid constitutional problems is another of the traditional tools of statutory construction applied before any deference is afforded to agency ivews. *See DeBartolo* 485 U.S. at 575. "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The FEC's dubious interpretation of § 441a(d) has been addressed above.

Because these traditional tools of statutory construction provide a clear meaning for § 441a(d), there is no ambiguity that opens the door to *Chevron* deference. Nor

could the FEC reasonably have construed § 441a(d) any other way.

C. The FEC Advisory Opinions Cannot Form the Basis for *Chevron Deference.*

Chevron deference rests on the presumed general intent of Congress. 464 U.S. at 844. Where, as here, Congress has specifically forbidden such deference, or where agency decisionmaking is not reasoned or consistent, deference is not proper.

1. *FECA Forbids the FEC From Establishing a Rule of Law Through Advisory Opinions.*

FECA expressly limits the way that the FEC may establish a "rule of law." Section 437f(b) provides that:

> Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued . . . except in accordance with the provisions of this section.

J.A. 225.

Through this provision, Congress specifically sought to assure that the Advisory Opinion process would be used solely to grant safe harbors for political speech, not to confer upon the Commission power to limit speech or engage in informal rulemaking. Thus, in addition to the general provisions quoted above, § 437f(c)(1) provides that FEC advisory opinions are not to extend beyond "any specific transaction or activity which is indistinguishable in all its material effects." Where FEC action is intended to regulate the public, the provisions of § 438(d) require that the FEC honor the requirements of the Administrative Procedures Act and that the FEC give Congress advance notice of any proposed "rule of law" along with "a detailed explanation and justification."[29] How-

[29] Until this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), rules proposed by the FEC could have been vetoed by either house of Congress. *See* § 438(d)(2).

ever, none of this occurred with respect to the "electioneering message" standard.

By holding that it "must defer" to an agency interpretation of § 441a(d) supposedly adopted in two Advisory Opinions, the court of appeals ignored the explicit provisions of FECA and, hence, fundamentally misapplied *Chevron.*

2. *The Advisory Opinions Here Do Not Supply an Interpretation Worthy of Deference.*

The three Advisory Opinions cited by the court of appeals do not establish an FEC position that is worthy of deference. Two of these Advisory Opinions, which supposedly set forth the vague "electioneering message" standard, do not reflect any consideration of First Amendment rights, nor do they provide an explanation for any deviation from an earlier opinion adopting the "express advocacy" standard.

The first Advisory Opinion addressing the meaning of "in connection with" in § 441a(d) states:

> if the [party] newsletter includes communications *expressly advocating the election or defeat of a clearly identified candidate* for Federal office, the expenses . . . must be treated as a general election expenditure under 2 U.S.C. § 441a(d).

FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978), J.A. 256-57 (emphasis added). The court of appeals conceded that this Advisory Opinion "can be read to adopt the express advocacy position." J.A. 42 n.7. In fact, that court did not suggest how else the Advisory Opinion reasonably could be read.

Seven years later, when asked about party advertisements that target "the current Democratic presidential candidates," "question or challenge the candidate's statements, position, or record," and then contain "a partisan statement to 'Vote Republican,'" the FEC, in Advisory

Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1984), J.A. 265, said:

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46.

Given its citation to AO 1978-46, AO 1984-15 seems to stand for the proposition that an advertisement pairing criticism of an identified Democratic candidate with an express statement to "Vote Republican" amounted to "express advocacy." Certainly, the opinion neither announces nor justifies a shift to a new "electioneering message" standard. Indeed, the term "electioneering message" appears nowhere in AO 1984-15.

One year later the FEC construed AO 1984-15 to mean that § 441a(d) requires only an identified candidate and an "electioneering message," which it defined as "statements 'designed to urge the public to elect a certain candidate or party.' " FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (May 30, 1985), J.A. 273 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)). This clearly seems to substitute a lesser and subjective standard for the objective test of "express advocacy." The FEC did not acknowledge any change and, incredibly, claimed to rely on AO 1978-46, which applied an express advocacy standard, as authority for its newly devised standard.

The FEC's view is entitled to no deference because the FEC has provided no explanation whatsoever for any *change* in position. This Court has determined that an agency's first construction of a statute deserves particular deference. A new and different agency position may also deserve deference, but only if the agency acknowledges and explains the change. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). The FEC did neither.

Indeed, the continued reliance on AO 1978-46, which adopted an "express advocacy" standard, suggests that the FEC may not even have recognized that a change in its position had occurred.

In addition, an agency's interpretation of a statute must be set aside where "the agency has . . . entirely failed to consider an important aspect of the problem." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Here the FEC failed to discuss the First Amendment implications of the "electioneering message" standard.

Moreover, an agency's *post hoc* rationalization before the courts does not suffice, because "an agency's action may not be upheld on grounds other than those relied on by the agency." *National R.R. Passenger Corp. v. Boston & Maine R.R.*, 503 U.S. 407, 420 (1992) (citation omitted). In none of the Advisory Opinions does the FEC discuss the types of considerations that FEC counsel relied upon below to justify an "electioneering message" construction of § 441a(d). *See* Reply Appeals Brief of the Federal Election Commission at 7-8, 10 (justifying the "electioneering message" standard as necessary to prevent circumvention of contribution limits and noting that "people of common intelligence would have no difficulty understanding" what speech would be prohibited under this standard).

Where, as here, the agency does not acknowledge any change, cites earlier contrary authority as if no change had occurred, and gives no explanation for the change, the agency position lacks the quality necessary to support *Chevron* deference. And this is doubly so where core First Amendment rights are at stake and where reliance upon these types of Advisory Opinions is prohibited by FECA.

CONCLUSION

For all the foregoing reasons, Petitioners the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer, respectfully pray that the judgment below be reversed.

Respectfully submitted,

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February 16, 1996